(1)

No. 00-1927

In The

Supreme Court of the United States

JESSE ODEN,

Petitioner,

v.

OKTIBBEHA COUNTY, MISSISSIPPI; DOLPH BRYAN, individually and in his official capacity as Sheriff of Oktibbeha County,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

*ROBERT B. MCDUFF
767 North Congress Street
Jackson, Mississippi 39202
(601) 969-0802

WILBUR O. COLOM
P.O. Drawer 866
Columbus, Mississippi
39703-0866
(601) 327-0903

Counsel for Petitioner
**Counsel of Record*

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QUESTIONS PRESENTED

1. Are punitive damages available in employment cases brought under 42 U.S.C. § 1981 against a government official, in his or her individual capacity, for racial discrimination?

2. Is it plain error to instruct the jury (in the absence of an objection) in a § 1981 case that it may award punitive damages against a government official for racial discrimination in employment?

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

JESSE ODEN,
Petitioner,
v.

OKTIBBEHA COUNTY, MISSISSIPPI;
DOLPH BRYAN, individually and in his
official capacity as Sheriff of Oktibbeha County,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jesse Oden requests that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The March 27, 2001 opinion of the Court of Appeals in the present matter is reported at 246 F.3d 458 and is reproduced in the appendix to this petition, Pet. App. 1.

JURISDICTION

The opinion of the Court of Appeals was issued on March 27, 2001. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

42 U.S.C. § 1981 provides in part:

> (a) All persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens. . . .
>
> . . .
>
> (c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1981a provides in part:

> (a)(1) In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 against a respondent who engaged in unlawful intentional discrimination . . ., and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section . . . .
>
> . . .
>
> (b) A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency, or political subdivision) . . . .

STATEMENT OF THE CASE

After hearing the evidence of racial discrimination suffered by the petitioner, Oktibbeha County Deputy Sheriff Jesse Oden, a jury awarded Mr. Oden $20,000 in compensatory damages and $80,000 in punitive damages. The award was levied against Sheriff Dolph Bryan both individually and officially, and against Oktibbeha County. Sheriff Bryan had promoted a less qualified officer over Mr. Oden because Mr. Oden is black and the other man is white. At the trial, none of

the defendants objected to the submission of the punitive damage option to the jury. Pet. App. 1-3, 10-12, 15-20.

On appeal, they complained for the first time. The United States Court of Appeals for the Fifth Circuit affirmed the compensatory damage award, but held that the punitive damage award was plain error. Pet. App. 10-12. The Fifth Circuit reached this conclusion by holding, first, that no cause of action exists under 42 U.S.C. § 1981 against state actors, pet. app. 3-7, second, that no cause of action exists in an employment case under § 1981 against a government official in his individual capacity, pet. app. 7-8, and, third, that while a cause of action exists under the other statute pled in this case, Title VII of the Civil Rights of 1964 (42 U.S.C. § 2000e), punitive damages are not available against governmental entities under that statute. Pet. App. 10-12.

REASONS FOR GRANTING THE WRIT

As this Court has held, plain error exists not simply where there is error, but where the error is "obvious" or "clear under current law." *United States v. Olano*, 507 U.S. 725, 734 (1993). The Fifth Circuit's opinion here was based on the contentions that § 1981 provides no cause of action against state actors and no cause of action against government officials in their individual capacities for discriminatory employment decisions. But those contentions are not "obvious" and are not "clear under settled law." Moreover, they raise important and unanswered questions regarding the scope of § 1981 -- questions about which the courts of appeals are in conflict.

The Fifth Circuit's holding that § 1981 does not apply to state actors is based on Justice O'Connor's opinion in *Jett v. Dallas Independent School District*, 491 U.S. 701, 731 (1989). Pet. App. 3-7. But that is a misreading of the opinion, which instead simply holds that any remedy against local governments is no broader under § 1981 than § 1983. *See, Jett*, 491 U.S. at

731 ("Congress intended that the explicit remedial provisions of § 1983 be controlling in the context of damages actions brought against state actors alleging violation of the rights declared in § 1981").

Moreover, subsequent to *Jett*, the Congress added to 42 U.S.C. § 1981 the provision codified at subsection (c) of that statute: "The rights protected by this section are protected against impairment by nongovernmental discrimination *and impairment under state law.*" (Emphasis added). That provision, coming as it did after the decision in *Jett*, affirms that § 1981 provides a remedy against state actors. The Ninth Circuit agrees. *Federation of African-American Contractors v. Oakland,* 96 F.3d 1204 (9th Cir. 1996). *See also,* SHELDON NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION, Section 3:87 ("Under the Civil Rights Act of 1991, a plaintiff who is the object of racial discrimination in employment can sue state actors directly under § 1981 without being forced to use § 1983"). While the Fifth Circuit in this case disagrees, as do some other courts of appeals, *see*, pet. app. 4-7 and n.2, the language of § 1981(c) and the Ninth Circuit's opinion show that the Fifth Circuit's answer to this question is not "obvious" or "clear under current law." In light of the lack of clarity and the conflict that exists, this Court should grant certiorari.

The Fifth Circuit also held that the sheriff cannot be sued individually under § 1981 for race discrimination in matters of employment. Pet. App. 7-8. This also is not a proposition that is "obvious" or "clear under current law." Indeed, the Fifth Circuit cited no cases to support this specific holding. (It did cite such cases with respect to Title VII, but not § 1981. Pet. App. 8). But § 1981 employment suits have long been permitted against government officials in their individual capacity. *See, e.g. Foulks v. Ohio Dept. of Rehabilitation and Correction*, 713 F.2d 1229, 1233 (6th Cir. 1983). Indeed, in *Jett*, this Court discussed the fact that a public school principal had been sued individually (along with the school district) and

found liable for employment decisions under §§ 1981 and 1983, never suggesting that this was inappropriate. 491 U.S. at 707-709. Just as government officials can be liable in their individual capacities under § 1983, so can they be liable under § 1981. The confusion illustrated by the Fifth Circuit's contrary opinion indicates the need for this Court to resolve the issue.

In the present case, the Fifth Circuit, having concluded that § 1981 does not allow lawsuits against state actors and also does not permit employment cases against government officials in their individual capacities, then examined the only other relevant cause of action brought in this case -- the Title VII claim -- and held that punitive damages are not permitted in Title VII cases against governmental entities. Pet. App. 10-12. It did so by looking at the language contained in 42 U.S.C. § 1981a(b)(1). That language, adopted as part of the Civil Rights Act of 1991, allows a complaining party under Title VII to recover punitive damages "against a respondent (other than a government, government agency or political subdivision)."

But while § 1981a(b) governs the availability of punitive awards under Title VII, it does not govern them under § 1981 itself. As stated in § 1981a(a)(1), § 1981a(b) applies only where the "complaining party cannot recover under Section 1981." Here, as noted previously, the complaining party can recover under § 1981.

The question then is whether punitive damages are available under § 1981 itself. If so, it matters not that they are unavailable against government agencies under Title VII by virtue of the limitations in § 1981a(b)(1).

Punitive damages have long been a part of the remedial arsenal – imposed in appropriate circumstances – in § 1981 cases. *Johnson v. Railway Express*, 421 U.S. 454, 460 (1975). Even if such damages are not be available under § 1981 against

governmental bodies themselves – just as they are not so available in § 1983 cases, *City of Newport v. Fact Concerts*, 453 U.S. 247 (1981) – surely they are available under § 1981 against government officials sued individually, just as they are under § 1983. *Smith v. Wade*, 461 U.S. 30 (1983). Nothing suggests otherwise.

Thus, the Fifth Circuit's ultimate holding is not "obvious" or "clear under current law." At least with respect to the sheriff in his individual capacity, the punitive damage award was not plain error. The Fifth Circuit's contrary conclusion, its holdings along the path toward that conclusion, and the conflict among the courts regarding these matters, all illustrate the need to grant certiorari and resolve the important and unanswered questions of § 1981 liability that have arisen in this case.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, a writ of certiorari should issue to review the decision of the Fifth Circuit in this case.

Respectfully Submitted,

*ROBERT B. MCDUFF
767 North Congress Street
Jackson, Mississippi 39202
(601) 969-0802

WILBUR O. COLOM
P.O. Drawer 866
Columbus, MS 39703-0866
(662) 327-0903

Counsel for Petitioner

*Counsel of Record

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 99-60878

JESSE ODEN,

Plaintiff-Appellee,

VERSUS

OKTIBBEHA COUNTY, MISSISSIPPI; DOLPH BRYAN, Individually and in his official capacity as sheriff,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Mississippi, Aberdeen

March 27, 2001

Before POLITZ, SMITH and PARKER, Circuit Judges.

ROBERT M. PARKER, Circuit Judge:

Defendants Oktibbeha County, Sheriff Dolph Bryan in his official capacity, and Dolph Bryan individually appeal from the judgment of the district court in which a jury awarded plaintiff Jesse Oden compensatory and punitive damages for Sheriff Bryan's failure to promote Oden to chief deputy. We reverse the punitive and compensatory damages against Oktibbeha County and Dolph Bryan individually and affirm the jury's compensatory damage award against Sheriff Bryan in his official capacity.

I.

In September of 1976, Jesse Oden and George Carrithers joined the Oktibbeha County Sheriff's Department. Oden worked as a part time radio operator, while Carrithers served as a part time jailer. The Department promoted Oden to full time road deputy in 1979. Carrithers received the same rank in 1980.

Sheriff Dolph Bryan dismissed his former chief deputy in 1986. Deputy Oden inquired about the job, but Sheriff Bryan informed him that he would not fill the vacant position. At the same time, Sheriff Bryan assigned Deputy Carrithers to office duties and gave him the title "administrative assistant." Deputy Oden remained working in the field. In 1997, Sheriff Bryan promoted Deputy Carrithers to chief deputy.

Deputy Oden filed a complaint with the Equal Employment Opportunity Commission, claiming age and race discrimination. Oden then sued Oktibbeha County, Sheriff Dolph Bryan in his official capacity, and Sheriff Dolph Bryan individually, asserting causes of action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 1981, and 42 U.S.C. § 1985.[1]

Oden presented evidence at trial showing his seniority, superior law enforcement training, and background in business management. According to Oden,

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[1] Neither the parties nor the district court contemplated the application of 42 U.S.C. § 1985 to this case. Because Oden failed to present evidence of a conspiracy to discriminate, this Court's analysis is limited to the plaintiff's causes of action under Title VII and 42 U.S.C. § 1981.

these assets should have ensured his promotion to chief deputy. The defendants argued that the chief deputy position was not a promotion in favor of Deputy Carrithers; rather, the assignment of the chief deputy rank was merely a change in job title. The defendants also claimed that Deputy Oden was unqualified. At the close of the plaintiff's case, the district judge entered a directed verdict for the defendants dismissing Oden's age discrimination claim. The jury returned a verdict in favor of Deputy Oden for race discrimination and assessed compensatory and punitive damages against all three defendants.

I. Proper Defendants Under Title VII and 42 U.S.C. § 1981

Oktibbeha County and Sheriff Bryan ("Appellants") argue that the district court erred by denying their motion to dismiss the County and the Sheriff in his individual capacity. This Court recognizes that Title VII does not provide the exclusive remedy for discrimination by employers. *See Hernandez v. Hill Country Tel. Coop., Inc.*, 849 F.2d 139, 142-43 (5th Cir. 1988). Courts may not, however, indiscriminately assess damage awards against persons and entities that are not responsible for an employer's unlawful discriminatory conduct. *See Huckabay v. Moore*, 142 F.3d 233, 241 (5th Cir. 1998) (holding that only employers are liable for unlawful conduct under Title VII). Because the remedies against the defendants under Title VII and § 1981 were not separated, we must determine whether the district court erred by assessing compensatory and punitive damages against

Oktibbeha County and the Sheriff in his official and individual capacities.

A. Defendants and Remedies under § 1981

Plaintiffs may plead causes of action under both Title VII and § 1981 against private employers to remedy discrimination in private employment contracts. *See Runyon v. McCrary*, 427 U.S. 160, 174 (1976); *Johnson v. Railway Express Agency, Inc.*, 412 U.S. 454, 459 (1975). Plaintiffs may also pursue a § 1983 cause of action against persons acting under color of state law in order to assert their substantive rights under § 1981. We must determine whether Oden can assert an independent cause of action under § 1981 against Oktibbeha County and the Sheriff in his official and individual capacities.

1. The County and the Sheriff in His Official Capacity

In 1989, the Supreme Court held in *Jett v. Dallas Independent School District*, 491 U.S. 701, 731 (1989), that § 1981 did not provide a separate cause of action against local government entities. The Court concluded that plaintiffs must assert a cause of action against state actors under § 1983 to remedy violations of civil rights under § 1981. *See id.* Several courts have addressed the continuing significance of the Court's plurality decision after Congress passed the Civil Rights Act of 1991. The Act amended § 1981 by adding subsection (c), which states that the rights protected by § 1981 "are protected against impairment by nongovernmental discrimination and

impairment under color of state law." 42 U.S.C. § 1981(c).[2] In order to determine whether Oden could pursue a separate cause of action under § 1981 against Oktibbeha County and the Sheriff in his official capacity, we must address whether the 1991 amendment abrogated the Court's holding in *Jett* and created a separate cause of action against local government entities.

Subsection (c) does not expressly create a remedial cause of action against local government entities, and we are not persuaded that such a remedy should be implied. In *Jett*, the Court held that Congress intended § 1983 to be the sole remedy for discrimination by persons acting under color of state law. *See Jett*, 491 U.S. at 731. The Court reasoned that § 1981 implicitly created an independent cause of action against private actors because no other statute created such a remedy. *See id.* at 732. Because § 1983 provided a remedy against persons acting under color of state law, the Court declined to imply a cause of action under § 1981 independent of § 1983. We are persuaded that the conclusion in *Jett* remains the same after Congress enacted the 1991 amendments. Subsection (c) addresses only substantive rights. Section 1983

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[2] The circuit courts are split as to the effect of the Civil Rights Act of 1991 upon the Court's holding in *Jett*. The Fourth Circuit and Eleventh Circuit concluded that the 1991 amendment had no affect on the Court's opinion. *See Butts v. County of Volusia*, 222 F.3d 891, 894 (11th Cir. 2000); *Dennis v. County of Fairfax*, 55 F.3d 151, 156 n.1 (4th Cir. 1995). The Ninth Circuit, however, concluded that the 1991 amendment implicitly created a cause of action against local government entities. *See Federation of African American Contractors v. Oakland*, 96 F.3d 1204 (9th Cir. 1996).

remains the only provision to expressly create a remedy against persons acting under color of state law. The addition of subsection (c) creates no more of a need for the judiciary to imply a cause of action under § 1981 against state actors than existed when the Supreme Court decided *Jett*.

The legislative history of the 1991 amendment is supportive of our conclusion. By enacting subsection (c), Congress stated that it intended to codify the Supreme Court's decision in *Runyon v. McCrary*. *See Butts*, 222 F.3d at 894 (citing H.R. Rep. No. 102-40(I), at 92 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 630; H.R. Rep. No. 102-40(II), at 37 (1991), reprinted in 1991 U.S.C.C.A.N. 694, 731). *See also Anderson v. Conboy*, 156 F.3d 167, 179 (2d Cir. 1998). In *Runyon*, the Supreme Court reaffirmed that § 1981 implies a right of action based on racial discrimination against private actors. *See Runyon*, 427 U.S. at 174-75. There is no congressional statement of intent to overrule *Jett*. By codifying *Runyon*, Congress confirmed that § 1981 implies a cause of action against private actors.

The question follows then why, if Congress only intended to codify *Runyon*, does subsection (c) include language referring to persons acting under color of state law? The Ninth Circuit reasoned that this allusion to persons acting under color of state law implies Congressional intent to create a remedy in addition to § 1983. *See Oakland*, 96 F.3d at 1213. We disagree. "[T]he judicial power to imply or create remedies . . . should not be exercised in the face of an express decision by Congress concerning the scope of remedies available under a particular statute." *Jett*, 491 U.S. at 732 (citing *National R.R.*

Passenger Corp. v. National Assn. of R.R. Passengers, 414 U.S. 453, 458 (1974). Because Congress neither expressed its intent to overrule *Jett*, nor explicitly created a remedy against state actors in addition to § 1983, we are not willing to deviate from the Supreme Court's analysis of § 1981 in *Jett*. Accordingly, Deputy Oden could not maintain an independent cause of action under § 1981 against Oktibbeha County and Sheriff Dolph Bryan in his official capacity.[3]

2. The Sheriff in His Individual Capacity

Sheriff Dolph Bryan claims that the district court erred by failing to dismiss Oden's claims against him in his individual capacity. The Sheriff does not dispute that § 1981 provides an implicit cause of action against private actors in private employment discrimination cases. *See Johnson v. Railway Express Agency, Inc.*, 412 U.S. 454, 459 (1975); *Adams v. McDougal*, 695 F.2d 104, 108 (5th Cir. 1983). Rather, he argues that he is not a proper party in this suit because he was acting in his official capacity.[4]

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[3] In any event, there is no evidence in the record that the promotion to chief deputy was in accordance with any custom or policy of the County. Rather, Sheriff Bryan's employment decision represented the policy of the Sheriff's Department, a separate government entity. Therefore, the judgment against the County cannot be imposed on the basis of *respondeat superior*. *See Board of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 415 (1997); *Jett*, 491 U.S. at 737.

[4] "Racial discrimination claims brought under § 1981 are subject to the defense of qualified immunity." *Todd v. Hawk*, 72 F.3d 443, 445 n.6 (5th Cir. 1995). However, Sheriff Bryan did not raise qualified immunity in the district court.

While the Supreme Court has extended § 1981 liability to cases involving private employment contracts, it has not imposed personal liability on elected officials for discrimination in the terms and conditions of local government employment contracts. *Cf. Brown v. General Servs. Admin.*, 425 U.S. 820, 835 (1976) (holding that Title VII is the exclusive remedy for seeking money damages against the federal government). In *Huckabay v. Moore*, this Court concluded that an individual was not an employer for purposes of Title VII when acting in his official capacity. *See* 142 F.3d at 241. Only officials should be responsible for discriminatory decisions concerning government employment contracts. *See id. See also Grant v. Lone Star Co.*, 21 F.3d 649, 652 (5th Cir. 1994) ("Only 'employers,' not individuals acting in their individual capacity who do not otherwise meet the definition of 'employers,' can be liable under Title VII."); *Harvey v. Blake*, 913 F.2d 226, 227 (5th Cir. 1990) (concluding that an elected official should not be liable for official acts). Likewise, when a plaintiff asserts a cause of action under § 1981 for discrimination in the terms and conditions of a municipal employment contract, the proper defendant is the government employer in his official capacity. Because Sheriff Bryan's choice to promote Deputy Carrithers to chief deputy was an official decision, he is not personally liable under § 1981.[5] We therefore dismiss the district court's judgment against Sheriff Bryan in his individual capacity.

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[5] In other contexts, § 1981 serves as an independent cause of action against individuals for discriminatory acts performed in their official capacities. *See, e.g., Todd*, 72 F.3d at 446 (allowing a prisoner to sue prison officials under § 1981 for discriminatory conduct concerning the "punishment, pains, [and] penalties"

B. Title VII Defendants

Title VII allows employees to sue their employers for discriminatory employment decisions. *See* 42 U.S.C. §§ 2000e-2(a), 2000e-5. An "employer" under Title VII is a "person in an industry affecting commerce who has fifteen or more employees. . . . " 42 U.S.C. § 2000e(b). A person "includes one or more individuals, governments, governmental agencies, [or] political subdivisions. . . . " 42 U.S.C. § 2000e(a). The trial court failed to designate which of the three defendants was Deputy Oden's employer.[6]

Federal law controls whether a person is an employer under Title VII, but courts can look to state law to understand the nature of the employment relationship. *See, e.g., Calderon v. Martin County,* 639 F.2d 271, 273 (5th Cir. Unit B 1981) (determining whether plaintiff constituted an employee under Title VII). Mississippi law allows a sheriff to appoint, remove, and fix the compensation of his deputies, subject to the county board of supervisor's approval of the sheriff's budget. *See* Miss. Code Ann. § 19-25-19. Sheriff Bryan was solely responsible for hiring, promoting, and establishing the deputies' wages. The County's only responsibility was to approve the Sheriff's

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provision in § 1981). Our decision regarding personal liability under § 1981 only applies to the liability of local government officials for their decisions affecting municipal employment contracts.

[6] Oktibbeha County and Sheriff Bryan in his official capacity are eligible employers under Title VII. Sheriff Bryan is not personally liable for the performance of wrongful acts in his official capacity. *See Huckabay,* 142 F.3d at 241.

budget and allocate the necessary funds. Because Sheriff Bryan was the elected official who made all decisions concerning promotions within the Sheriff's Department, he was Deputy Oden's employer for purposes of Title VII.[7] We therefore reverse the district court's judgment against Oktibbeha County and Sheriff Dolph Bryan individually under Title VII.

B. Punitive Damages Under Title VII

Appellants argue that the Civil Rights Act of 1991 limits Sheriff Bryan's liability in his official capacity to compensatory damages. The Act allows plaintiffs asserting a Title VII claim to recover compensatory and punitive damages, provided that recovery is unavailable under § 1981. *See* 42 U.S.C. § 1981a(1).[8] The Act precludes

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[7] *See Simmons v. Lyons*, 746 F.2d 265, 270 (5th Cir. 1984); *Ryals v. Mobile County Sheriff's Dept.*, 839 F. Supp. 25 (S.D. Ala. 1993). *See also Lee v. Coahoma County*, 937, F.2d 220, 226 (5th Cir. 1991), *amended in part*, 37 F.3d 1068 (1993) (holding that a Mississippi sheriff was an "employer" under the Fair Labor Standards Act). *Cf. Spencer v. Byrd*, 899 F. Supp. 1439, 1441 (M.D.N.C. 1995) (concluding that the county, rather than the sheriff, was an employer under Title VII because the county limited the number of the sheriff's deputies and provided the deputies' compensation); *Johnson v. Board of County Comm'rs for County of Freemont*, 859 F. Supp. 438, 442 (D. Col. 1994) (holding that the economic ties between the Board of Commissioners and the sheriff demonstrated that the Board was the Title VII employer).

[8] Section 1981a states:

> In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5) . . . against a respondent who engaged

plaintiffs from recovering punitive damages against governments, government agencies, and political subdivisions. *See* 42 U.S.C. § 1981a(b); *Baker v. Runyon*, 114 F.3d 668, 669 (7th Cir. 1997), *cert. denied*, 119 S.Ct. 335 (1998).

Oden does not dispute the applicability of § 1981a to the Sheriff in his official capacity. Oden contends that the appellants forfeited their argument on appeal because the objections to the district court's jury instructions were not specific. *See* Fed. R. Civ. P. 51. We agree that the appellants failed to properly preserve their objection.

If a litigant forfeits a point of error on appeal, we review the district court's decision under the plain error standard. *See Douglass v. United Serv. Auto. Ass'n*, 79 F.3d 1415, 1427 (5th Cir. 1996) (en banc). For this Court to correct an error not raised at trial, "there must be (1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights.' " *Johnson v. United States*, 520 U.S. 461, 467 (1997) (quoting *United States v. Olano*, 507 U.S. 725, 732 (1993)). If plain error exists, this Court should not exercise its discretion to correct the error unless "the error seriously

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in unlawful intentional discrimination (not an employment practice that is unlawful because of disparate impact) prohibited under section 703, 704, or 717 of the Act (42 U.S.C. 2000e-2 or 2000e-3) . . . , and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964 . . . , from respondent. 42 U.S.C. § 1981a(a)(1).

affects the fairness, integrity or public reputation of judicial proceedings." *Id.*

The district court committed "plain error" by assessing punitive damages against the Sheriff. Section 1981a prohibits punitive damage awards against governments and political subdivisions. Subjecting the Sheriff to an $80,000 punitive damage award is inapposite to Congress's intent to preclude local government entities from paying such judgments. We find it appropriate even under a plain error standard to correct judgments that are contrary to the express limits federal law imposes on judicial authority, and therefore reverse the punitive damage award against Sheriff Bryan in his official capacity.

C. The Personal Staff Exception

Title VII relieves employers from liability for decisions affecting members of a personal staff. *See* 42 U.S.C. § 2000e(f).[9] The exception includes appointments to a

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[9] Title VII states:

> The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws

staff position. *See Teneyuca v. Bexar County*, 767 F.2d 148, 150-53 (5th Cir. 1985). Appellants maintain that the district court erred in denying their motion for judgment as a matter of law because the chief deputy position is part of Sheriff Bryan's personal staff. Oden claims that the Appellants waived the personal staff exception by asserting it for the first time in their motion for post-trial relief.

Rule 8(c) of the Federal Rules of Civil Procedure lists nineteen affirmative defenses that must be set forth in a responsive pleading. *See* Fed. R. Civ. P. 8(c). In addition to these nineteen defenses, Rule 8(c) includes "any other matter constituting an avoidance or an affirmative defense." *Id.* To qualify as a defense under Rule 8(c)'s residuary clause, we look to the logical relationship between the defense and the cause of action and assess whether failure to timely plead the defense will result in unfair surprise. *See Ingraham v. United States*, 808 F.2d 1075, 1079 (5th Cir. 1987). "A defendant should not be permitted to 'lie behind a log' and ambush a plaintiff with an unexpected defense." *See id.* at 1079. The personal staff exception allows the defendant to avoid liability even if the plaintiff meets his burden of proof under Title VII. *See id.* The defendant bears the initial burden of demonstrating that the personal staff exception applies. *See Nichols v. Hurley*, 921 F.2d 1101, 1111 (10th Cir. 1990); *Teneyuca v. Bexar County*, 767 F.2d 148, 152 (5th Cir. 1985).

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of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States. 42 U.S.C. § 2000e(f).

The Appellants raised the personal staff exception for the first time in their motion for judgment as a matter of law, which was filed after the jury returned its verdict and the district court entered its judgment. Oden was denied the opportunity to present evidence at trial concerning the applicability of the personal staff exception. " 'Affirmative defenses . . . will defeat an otherwise legitimate claim for relief [and] must be set forth to avoid surprise and give the opposing party an opportunity to respond.' " 2 James W. Moore et al, Moore's Federal Practice § 8.07[1], at 8-35 (3d ed. 2000) (citing *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 350 (1971)). Allowing the Appellants to wait until after the jury verdict to assert the personal staff exception was an unfair surprise to Oden. The personal staff exception is an affirmative defense that must be pleaded under Rule 8(c).[10] Appellants waived the personal staff exception by failing to raise it in a responsive pleading.

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[10] This Court's holding is consistent with cases concluding that statutory exemptions should be pleaded as affirmative defenses. *See Donovan v. Hamm's Drive Inn*, 661 F.2d 316, 317 (5th Cir. Unit A 1981) (concluding that an exemption under the Fair Labor Standards Act is an affirmative defense that is waived if not pleaded); *Brennan v. Valley Towing Co.*, 515 F.2d 100, 104 (9th Cir. 1975) (holding that an exception under the Fair Labor Standards Act must be pleaded as an affirmative defense); Wright & Miller: Federal Practice & Procedure § 1271 (1990); 2 James W. Moore et al., Moore's Federal Practice § 8.07[5] (3d ed. 2000).

II. Sufficiency of the Evidence

Appellants also argue that the trial court erred by denying their motion for judgment as a matter of law because the record contained insufficient evidence to support the jury's verdict. We review a district court's denial of a motion for judgment as a matter of law de novo. *See Russell v. McKinney Hospital Venture*, 235 F.3d 219, 222 (5th Cir. 2000). "Judgment as a matter of law is appropriate if 'there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue.' " *Id.* (quoting Fed. R. Civ. P. 50(a)). After reviewing the evidence in the record, we draw all reasonable inferences in favor of the nonmoving party, disregarding evidence favorable to the moving party. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 120 S.Ct. 2097, 2110 (2000).

To prove a claim of intentional discrimination, a plaintiff must first establish a prima facie case. *See id.* at 2106; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Oden can demonstrate a prima facie case by showing that (1) the plaintiff was within a protected class; (2) he was qualified for the position sought; (3) he was not promoted; and (4) the position was filled by someone outside the protected class. *See Blow v. City of San Antonio, Texas*, 236 F.3d 293 (5th Cir. 2001) (citing *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-53). The record shows that Oden, an African-American, was a member of a protected class, that he inquired about the chief deputy position, that he was not promoted to the higher rank, and that George Carrithers, a white male, was appointed to the position.

The Appellants contend that Oden cannot establish a prima facie case of race discrimination because the chief deputy appointment was not a promotion. Appellants claim that the analysis in § 1981 promotion cases should apply to support their argument under Title VII. In *Patterson v. McLean Credit Union*, 491 U.S. 164, 175-77 (1989), the Supreme Court held that plaintiffs must show that the failure to receive a promotion amounts to a denial of the opportunity to form a new and distinct employment relationship. *See also National Ass'n of Gov. Employees v. City Public Serv. Board of San Antonio, Texas*, 40 F.3d 698, 714 (1994). In *Patterson*, the Court restricted claims under § 1981 to redress discriminatory conduct "at the initial formation of the contract" or "conduct which impairs the right to enforce contract obligations through legal process." *Patterson*, 491 U.S. at 179. *See also Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363, 1370 (5th Cir. 1992). The Court reasoned that § 1981 was restricted to the contractual relationship between an employer and employee, while Title VII addresses a more expansive scope of conduct. *See id.* at 180. The contract analysis for promotion claims under § 1981 therefore does not necessarily apply to Title VII suits.[11]

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[11] In any event, the *Patterson* decision was legislatively reversed by the Civil Rights Act of 1991. *See Harrington v. Harris*, 118 F.3d 359, 367 n.8 (5th Cir 1997). Section 1981 now states that, "[f]or purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b). Both § 1981 and Title VII now apply to the terms and conditions of the employment relationship, rendering the *Patterson* analysis inapplicable.

Title VII "is not limited to economic or tangible discrimination, . . . and it covers more than terms and conditions in the narrow contractual sense." *Faragher v. City of Boca Raton*, 524 U.S. 775, 786 (1998) (citations ommitted). To establish a prima facie case for discrimination under Title VII, Oden must show that, at the very least, the alleged discriminatory conduct tended to adversely affect him. *See Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 708 (5th Cir. 1997) (stating that the discrimination provision in Title VII is "much broader" than the retaliation provision and applies to activity that tends to adversely affect the employee). At most, Oden must demonstrate that Sheriff Bryan made an ultimate employment decision. *See Shackelford v. Deloitte & Touche, LLP*, 190 F.3d 398, 406-07 (5th Cir. 1999) (noting that the "ultimate employment decision" standard applied in retaliation cases may not apply to claims of race discrimination). Regardless of which standard applies, Sheriff Bryan's appointment was an ultimate employment decision. The Sheriff testified that only one person could fill the chief deputy position. By appointing Deputy Carrithers to the higher rank, Sheriff Bryan precluded Deputy Oden from becoming second in command. Sheriff Bryan's appointment was an employment decision that could subject him to Title VII liability.

Appellants further contend that Oden failed to establish a prima facie case because he was not qualified for the job. Sheriff Bryan testified that the chief deputy position required administration skills and an understanding of the office computer system. Deputy Carrithers was the only person in the Sheriff's Department who acquired these skills. Oden claims that, because the Sheriff never

posted the qualifications for chief deputy before appointing Carrithers, the Sheriff's stated qualifications were pretext.

A plaintiff must demonstrate that he meets objective promotion criteria at the prima facie stage of his case. *See Medina v. Ramsey Steel Co., Inc.*, 238 F.3d 674 (5th Cir. 2001); *Lindsey v. Prive Corp.*, 987 F.2d 324, 327 (5th Cir. 1993). Whether an employer's subjective hiring criteria serves as pretext for discrimination is an issue for the trier of fact to decide in the later stages of the burden-shifting analysis. *See id.* Oden was a road deputy with almost twenty years of experience at the time the Sheriff appointed Deputy Carrithers to the chief deputy position. Oden had seniority over every other officer in the Department. Other deputies testified that Oden was much better at working with the general public than Deputy Carrithers. In addition, Oden possessed managerial skills that he developed before working for the Sheriff's Department. On the basis of this evidence, Oden satisfied objective hiring criteria and established his prima facie case.

Once a plaintiff satisfies his prima facie case, the employer must assert a legitimate, nondiscriminatory reason for his decision. *See McDonnell Douglas*, 411 U.S. at 802. If an employer alleges a nondiscriminatory explanation, the factfinder must determine the " 'ultimate question: whether [the] plaintiff has proven [intentional discrimination].' " *Russell*, 235 F.3d at 222 (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511-12 (1993). "It is not enough . . . to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrmination." *Hicks*, 509 U.S. at 519. "Thus,

plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves*, 120 S.Ct. at 2109.

The Sheriff's asserted nondiscriminatory reason for promoting Deputy Carrithers over Deputy Oden was that Carrithers met the qualifications for the job. The Sheriff claimed that a chief deputy must be familiar with the administration of the Sheriff's Department and the Department's computer system. Oden argues that Sheriff Bryan's stated qualifications were pretext. Our task then is to determine whether sufficient evidence supports the jury's verdict in Oden's favor, viewing the evidence in the light most favorable to Oden, the nonmovant. *See Reeves*, 120 S.Ct. at 2110.

In addition to the evidence supporting his prima facie case, Oden established that he completed more law enforcement training than Deputy Carrithers and that he was proficient in some office skills, such as reviewing the other deputies' paperwork. Sheriff Bryan gave Deputy Carrithers the opportunity to improve his administrative skills without giving Oden the same chance. Deputy Oden could clearly meet most of the Sheriff's qualifications, but for the Sheriff's decision to groom someone else for the position.

To further refute the Sheriff's subjective qualifications, Oden presented evidence that Sheriff Bryan previously overlooked qualified African-American applicants for deputy positions in favor of white applicants with less experience. Sheriff Bryan also stated that, if he could

have filled two chief deputy positions, then he would have appointed both Oden and Carrithers. The Sheriff therefore admitted that computer skills and an acute knowledge of the office's administrative needs were not the primary qualifications for chief deputy. In fact, the transcript shows that the former chief deputy, like Deputy Oden, worked as a road deputy instead of an administrative assistant. After reviewing the record in the light most favorable to the verdict, we find that the record contains sufficient evidence to support the jury's finding of intentional discrimination.[12]

III. Compensatory Damages

The jury awarded Oden $20,000 in compensatory damages for mental anguish and emotional stress that he suffered as a result of Sheriff Bryan's conduct. Section 1981a allows juries to award compensatory damages for mental anguish and suffering. *See* 42 U.S.C. § 1981a(a)(1).[13] Appellants claim that the award of

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[12] The Appellants further claim that the jury was biased and prejudiced by irrelevant testimony. Appellants neither specified any instances in the record as to when the alleged irrelevant testimony occurred nor supported their argument with adequate legal authority. Because we do not consider issues that are inadequately briefed, we do not address this contention. *See Rutherford v. Harris County, Texas*, 197 F.3d 173, 193 (5th Cir, 1999).

[13] Section 1981a excludes backpay or any other relief under 42 U.S.C. § 2000e-5(g). Compensatory damages include awards for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses. . . . " 42 U.S.C. 1981a(b)(3).

compensatory damages was not supported by the evidence. We review the award of mental anguish damages for abuse of discretion. *See Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 940 (5th Cir. 1996).

In many cases, "a claimant's testimony alone may not be sufficient to support anything more than a nominal damage award." *Id.* at 938. Plaintiffs are required to prove damages for mental anguish and suffering to a "degree of specificity which may include corroborating testimony or medical or psychological evidence. . . . " *Id.* (citing *Carey v. Piphus*, 435 U.S. 247, 264 (1978)). We however have not required corroborating testimony and medical evidence in every case involving nonpecuniary compensatory damages. *See Migis v. Pearle Vision, Inc.*, 135 F.3d 1041, 1046 (1998); *Farpella-Crosby v. Horizon Health Care*, 97 F.3d 803, 809 (5th Cir. 1996). In *Migis*, the district court relied solely on the plaintiff's testimony. The plaintiff stated that her employer's discrimination caused her low self-esteem, serious financial hardships in relation to her newborn child, anxiety attacks, stress, and sleeplessness. *See Migis*, 135 F.3d at 1046. We concluded that the district court did not abuse its discretion by awarding compensatory damages because Migis' testimony was sufficiently detailed to support the award. *See id.* at 1047.

We have reviewed the evidence presented by Oden, which included his testimony concerning stress, sleeplessness, betrayal, and shame, and find that there is sufficient evidence to support the jury's award.

IV. Conclusion

In sum, we reverse the district court's judgment against Oktibbeha County. Oden could not assert an independent cause of action against a local government entity under § 1981, and the County is not an employer for purposes of Title VII. We also reverse the district court's judgment against the Sheriff in his individual capacity because the Sheriff is not personally liable for his official employment decisions under Title VII and § 1981. We reverse the district court's judgment as to the punitive damage award against the Sheriff in his official capacity because § 1981a prohibits punitive damages against government entities. Finally, we affirm the district court's judgment assessing compensatory damages against the Sheriff in his official capacity.

REVERSED IN PART; AFFIRMED IN PART

POLITZ, Circuit Judge, specially concurring:

I specially concur, but conclude that the more appropriate disposition of the 42 U.S.C. § 1981(c) issue presented herein would be as that accorded by our colleagues in the Ninth Circuit in *Federation of African American Contractors v. Oakland*, 96 F.3d 1204 (9th Cir. 1996).

No. 00-1927

IN THE

Supreme Court of the United States

JESSE ODEN,

Petitioner,

v.

OKTIBBEHA COUNTY, MISSISSIPPI
DOLPH BRYAN, individually and in his
official capacity as Sheriff of
Oktibbeha County,

Respondents.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

BRIEF IN OPPOSITION

JOHN FOX
P.O. Box 167
Houston, MS 38851
(662) 456-4201

WILLIAM J. COLE*
P.O. Box 13509
Jackson, MS 39236
(601) 969-7050

JACKSON M. BROWN
P.O. Box 57
Starkville, MS 39760
(662) 323-4126

Attorneys for Respondents

* *Counsel of Record*

169013

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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STATEMENT OF FACTS

The Complaint before the lower Court dealt with the issue of whether or not Plaintiff, Deputy Jesse Oden of the Oktibbeha County Sheriff's Department was a victim of race discrimination when the Defendant Sheriff Dolph Bryan made a decision to designate Deputy George Carrithers as "Chief Deputy".

Both Deputy Oden and Deputy Carrithers joined the Sheriff's Department at the same time, September 1976.

Oden was employed part time; starting as a radio operator and then patrolling with a constable, which was not paid work. (R. Vol. 2 Oden p. 5-6).

Carrithers began as a part time jailer (R. Vol. 2 Oden p. 7). Oden was promoted to road deputy in 1977 patrolling at night and weekends. (R. Vol. 2 Oden p. 8). Because of the small size of the department and budget, he was only allowed to work 32 hours a week. In 1979, Oden was offered a full time position as Deputy. (R. Oden p. 9). At the time, there were only two deputies at the Sheriff's office.

In 1980, Carrithers became a full time road deputy. In 1986, the Chief Deputy who had been there prior to the Sheriff was fired and Oden approached the Sheriff about the position and was told because of the size of their office he was not going to appoint a Chief Deputy. (R. Oden p. 15).

At the same time, a secretary quit and the Office was in need of administrative help. (R. Vol. 3 p. 281). Carrithers began to help out and over time, became the Administrative Assistant. Oden stated he did not question the Sheriff.

In March 1996, Oden had a heart attack and then surgery which kept him out of work until July 1996. In December 1996, Bryan designated Carrithers as Chief Deputy. Neither Oden nor Carrithers duties or pay changed as a result of this designation as Chief Deputy.

REASONS FOR DENYING THE WRIT

The Petitioner in an effort to obtain certiorari review, suggests that the Fifth Circuit misapplied the scope of 42 U.S.C. § 1981 based upon a misreading of *Jett v. Dallas Independent School District*, 491 U.S. 701 (1989), in denying the petitioner's punitive damages. Petitioner argues that a conflict among the circuits on the question of whether or not *Jett* has been overruled and § 1981 offers an independent cause of action warrants this review.

I. Petitioner erroneously suggest that *Jett* has been overruled by implication in the 1991 amendment to 42 U.S.C. § 1981.

Beginning with a broad assault on the *Jett*, *supra*, Petitioner finds solace in the Ninth Circuit's opinion in *Federation of African-American Contractors v. Oakland*, 96 F.3d 1204 (9th Cir. 1996) over the question of whether or not the 1991 amendment to § 1981 actually overturned *Jett*. Petitioner then attempts to weave a more expansive web of the relationship between § 1981, § 1983 and Title VII to support a view that the Appeals Court was in error in Oden.

The error here lies principally upon the Petitioner when he attempts to over broaden the Court's reasoning and conclusion in *Federation*, *supra*, and what he suggests is a conflict with *Jett*, *supra*.

While it is an accurate observation that there is a fundamental difference in the application of § 1981 under *Jett* and *Federation*. However, this does not manifest itself in persuasive support of the Petitioner's conclusion.

The gensis of this conflict lies in the interpretation of Congress's intent in amending § 1981 in 1991. While the Ninth Circuit went to elaborate steps to find *Jett*, *supra*, overruled by the 1991 amendment they remained somewhat timid in their approach and cautious in their conclusion. First the Ninth Circuit relies on a *Cort*[1] analysis to find that Congress intended to create by implication a private cause of action. We would submit that the "implication" of amendment should not be favored in statutory construction and does not establish great confidence in the conclusion *Butts v. County of Voulusia* 222 F.3d 891 (11th Cir. 2000).

To follow the Petitioner's path requires more than an implication. The legislative history of the 1991 act is sparse at best and does not reveal any clear intent to amend or to alter *Jett*. The Court has had frequent occasion to note that such indefinite congressional expressions cannot negate plain statutory language and cannot work a repeal or amendment by implication. "As a general matter, when a particular interpretation of statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constructions*, 485 U.S. 568, 575, 108 S. Ct. 1392, 99 L. Ed. 2d 645 (1988).

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1. *Cort v. Ash*, 422 U.S. 66, 95 S. Ct. 2080 (1975). In *Thompson v. Thompson*, 484 U.S. 174, 108 S. Ct. 513, 98 L. Ed. 2d 512 (1988) there is a suggestion that *Cort* has been "effectively overruled".

The intent of Congress remains the ultimate issue, however, and unless this congressional intent can be inferred from the language of the statute structure, or some other source, the essential predicate for implication of a private remedy simply does not exist. The Court has long since abandoned its hospitable attitude towards implied rights of action. The recent history of the Court's holding is one of repeated rejection of claims of an implied right. *Thompson v. Thompson*, 484 U.S. 174, 108 S. Ct. 513, 98 L. Ed. 2d 512 (1988).

In enacting the Civil Rights Act of 1991, Congress gave little discussion to subsection (c) of Section 1981. At no time in either the official summaries or in floor debate surrounding the enactment of subsection (c) was there any mention of *Jett* or the scope of municipal liability under Section 1981.[2] It is unlikely that his glaring omission was accidental or the product of respectful restrain. Certainly Congress did not hesitate elsewhere in the same reports to denounce Supreme Court's decisions.

The Fifth Circuit's holding is strengthened by Congress' failure to make any reference to *Jett* or the issue of municipal liability in adding subsection (c). In a statute that was passed expressly to overturn or modify a number of Supreme Court decisions, including decisions involving § 1981, it would be difficult for the Court to find that an amendment that clearly was intended to address certain Supreme Court decisions by name had in fact overturned another (Jett) without any mention or discussion but rather on an implied reasoning of legislative intent.

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2. *See* H.R. Rep. No. 40 (I) at 92, 141, *reprinted* in 1991 U.S.C.C.A.N at 630, 670.

Petitioner attempts to take a much broader approach with a total overturning of *Jett*, *supra*, and an implied amendment of § 1981. The Petitioner would argue that under those circumstances he can sue an autonomous and independently elected official under Title VII for racial discrimination in a failure to promote case and obtain compensatory damages against the local government and Sheriff and then maintain a punitive damage claim against the same under § 1981. This entire approach is fatally flawed and fails to recognize the distinction between Title VII, § 1981 and § 1983 and individual capacity suits, under this factual situation.

First one must find and conclude that a statue which contains or effects fundamental immunities and opens up a new cause of action against a political subdivision which subjects it to punitive damages can be amended by implication. In light of the Court's recent refrain to Congress on the over extension of the Commerce Clause, we find it hard to accept the petitioner's argument. One must tread lightly when implying the abrogation of immunities or affecting the federal balance.[3]

This same reluctance should manifest in any implied amendment removing immunity from local political subdivision and subjecting them to punitive damages.

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3. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55, 116 S. Ct. 1114, 134 L. Ed. 3d 252 (1996); *see also Wheeling U Lake Erie Railway Co. v. Public Utility Comm'n of Pa.*, 141 F.3d 88, 91 (3d Cir. 1998). *College Sav. Bank v. Florida Prepaid Postsecondary Ed. Expense Bd*, 131 F.3d 353, 357 (3d Cir 1997), *aff'd* 527 U.S. 666, 119 S. Ct. 2219, 144 L. Ed. 2d 605 (1999).

II. Neither the Congress or this Court has exercised any opportunity to overrule the holdings in *Jett.*

This Court has had other occasions since 1991 to review the amendment of § 1981 and any apparent conflict and overrule *Jett.* That has not been done and in fact in two subsequent cases *Jett* was cited with approval. *McMilliam v. Monroe County Alabama*, 117 S. Ct. 1734, 520 U.S. 781, 138 L. Ed. 2d 1 (U.S. Ala. 1997) *Board of County Commissioners of Bryan Co., Ok. v. Brown*, 117 S. Ct. 1382, 520 U.S. 397, 137 L. Ed. 2d 626 (U.S. Tex. 1997). *Jett* has been cited positively in hundreds of cases throughout the country. The fundamental law of *Jett* remains valid notwithstanding the amendment by implication. Numerous Courts have declined the invitation to overrule the holding in *Jett.*[4]

III. Petitioner's reliance upon the holding in *Federation of African American Contractors* v. *Oakland*, 96 F.3d 1204 (9th Cir. 1996) ignores the fundamental commonality with the holding in *Jett.*

Any difference between *Jett* and *Federation* is not that great when distilled to the underlying foundation necessary to assert either § 1981 or § 1983 claims and remedies.[5]

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4. *See, e.g., Dennis v. County of Fairfax*, 55 F.3d 151, 156 n.1 (4th Cir. 1995); *Johnson v. City of Ft. Lauderdale, Fla.*, 903 F. Supp. 1520, 1522-23 (S.D. Fla. 1995), *aff'd*, 114 F.3d 1089 (11th Cir. 1997); *Philippeauz v. North Cent. Bronx Hosp.*, 871 F. Supp. 640, 654-56 (S.D.N.Y. 1994), *aff'd*, 104 F.3d 353 (2d Cir. 1996), *cert. denied*, 520 U.S. 1105, 117 S. Ct. 1110 (1997).

5. *See Federation*, 96 F.3d at 1210-14.

Even those courts which permit § 1981 claims to proceed against municipal actors including the Ninth Circuit have applied to those § 1981 claims the same custom or policy requirement found with § 1983 cases as set forth in *Monell v. Dep't of Social Services*, 436 U.S. 658 (1978).

While *Jett* was decided prior to the 1991 amendments any semblance of conflict does not rise to a level of amelioration of fundamental law. Any schism between *Jett* and *Federation* is simply not as wide nor as deep as the Petitioner would like the Court to accept, even assuming that the reasoning of the Ninth Circuit is valid.

The Court in *Jett*, *supra*, held that in order to enforce § 1981, one must invoke § 1983 which requires an allegation and proof of the state actors acting pursuant to a "policy or custom".

The Ninth Court in *Federation*, *supra* concluded that the amended § 1981 created an implied cause of action against state actors, relieving any plaintiff of invoking § 1983 to remedy a violation of § 1981. However, the Court concluded that in raising a violation under § 1981 and bringing a cause of action thereunder requires an allegation and proof of a "policy or custom", the same prerequisite as § 1983.[6]

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6. A governmental entity can be sued and subjected to monetary damages and injunctive relief under 42 U.S.C. § 1983 only if its official policy or custom causes a person to be deprived of a federally protected right, *Board of County Comm'rs of Bryan County, Okla. v. Brown*, 520 U.S. 397, 403 (1997); *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 697 (1978).

The fact is not withstanding either holding there is no fundamental conflict in the standard to be employed or results that can be achieved whether you employ *Jett* or *Federation*. In *Federation*, at 1214, the Court wrote;

> Implying a cause of action directly under § 1981, moreover, will not disrupt federal civil rights litigation, and will impose no greater burden on government defendants, who under *Jett* were subject to suits under 42 U.S.C. § 1981. Allowing plaintiffs to bring suits against municipalities directly under § 1981 to enforce § 1981 rights instead of under § 1983 imposes no substantive change on federal civil rights law.

Respondent submits that the reverse is equally true, adhering to *Jett*, any appearances of conflict between *Jett and Federation* is immaterial to the Petitioner's case in that it is flawed under either prescription of either Court.

IV. Petitioner's arguement, even with the wholesale acceptance of the view of the Ninth Circuit and the overruling of *Jett* would still not resurrect Petitioner's cause nor would such a decision by the Court be dispositive of this case.

Petitioner's argument is untenable due to the failure of his complaint to properly invoke § 1981 and or § 1983.

The guise of conflict does not lessen the Petitioner's flawed argument. The substantive issues have not changed whether you consider § 1981 or § 1983. The overruling of *Jett* affords petitioner nothing more. His task remains the same. Petitioner has a "heightened pleading" requirement

under either § 1981 as viewed by *Federation supra*, or § 1983 as applied to § 1981 as viewed by *Jett*, *supra*. The Fifth Circuit in its Oden opinion recognized this flaw in the petitioner's argument.

First if you take the *Federation*, *supra*, reasoning the Petitioner's cause remains dependent upon proper allegations and proof of a "custom or policy". The Fifth Circuit noted the failure of the Petitioner's case on this requirement in footnote 3 to the Court's opinion.

Second, Petitioner has attempted in it's appellate arguments to weave back and forth under a broad umbrella that this case proceeded under Title VII, § 1981 and § 1983. Depending upon the issue, Petitioner employed the standards for each in a selective application that widely misses the mark.

The Petitioner's complaint in the District Court lacked the rudimentary pleadings necessary to state a cause of action under either § 1983 or § 1981, As a result any conflict or overruling of *Jett* is moot and Petitioner's case cannot be resuscitated by further appeal.

In *Johnson v. Harris County Flood Control Dist.*, 869 F.2d 1565, 1573 (5th Cir. 1989), *cert. denied*, 493 U.S. 1019, 110 S. Ct. 718, 107 L. Ed. 2d 738 (1990), the Court carefully analyzed the relationship between Title VII and Section 1983.

> Although Title VII supplements and overlaps § 1983, it remains an exclusive remedy when a state or local employer violates only Title VII. When however, unlawful employment practices encroach, not only on rights created by Title VII,

> but also on rights that are independent of Title VII, Title VII ceases to be exclusive. At this point, § 1983 and Title VII overlap, providing supplemental remedies.

The Plaintiff in this case failed to assert any § 1983 claim or to reference § 1983 in his complaint or to allege any "custom or policy" to support either a § 1983 or § 1981 claim. This void is fatal to any suggestion on appeal that he may invoke liability under a § 1983 standard, whether it be § 1981 alone or § 1981 through § 1983.

"Accordingly, because plaintiff did not invoke § 1983 in their complaint, the Court concludes that their § 1981 claims are due to be dismissed". *Anderson v. Bd. Of School Commission of Mobile County*, 78 F. Supp. 2d 1266 (S.D. Ala. 1999). The same fundamental result would exist even if *Federation* analysis was instituted.

Under *Jett*, the failure to properly plead § 1983 is fatal to sustaining the petitioner's § 1981 claim. The Petitioner simply failed to provide the necessary foundations in its complaint whether one accepts the *Jett* view or the *Federation* view. Two Fifth Circuit cases are illustrative.

In order to hold a municipality or a local government unit liable under Section 1983 for the misconduct of one of its employees, a plaintiff must initially allege that an official policy or custom was a cause in fact of the deprivation of rights inflicted. *See Spiller v. City of Texas City Police Dep't.*, 130 F.3d 162 (5th Cir. 1997) and *Meadowbriar Home for Children, Inc. v. Gunn*, 81 F.3d 521 (5th Cir. 1996). This must be viewed as most instructive when considering the Petitioner's arguement. Accepting the logic and reasoning in *Federation* would afford the Petitioner the same result.

The description of a policy or custom and its relationship to the underlying constitutional violation, moreover, cannot be conclusory; it must contain specific facts.[7] This the Petitioner failed to do.

In this case the Petitioner/plaintiff filed a complaint with EEOC, obtained a letter for the Right to Sue and filed his complaint. No reference or pleading asserted a § 1983 claim. There was only one attempt made at a suggestion of a county "policy". (Rec. Vol. 1, p. 149). This suggestion was solicited from a former County Supervisor and represented his opinion. However the fact is, and the Appellee acknowledged, the County in fact had a nondiscrimination policy. In fact Oden had been promoted three times prior to this. Petitioner's cause is defective under either *Jett* or *Federation*. As a result Petitioner's case cannot be resurrected at this stage.

V. Petitioner reliance on a "conflict" to shore up the flaws in Petitioner case misses the mark.

Petitioner's argument is more about procedure than substance and as a result even assumption of the correctness of the Ninth Circuit's reasoning on the impact of the 1991 amendments to § 1981 would not alter the results of this case.

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7. The facts necessary have been referred to a "heightened pleading" which requires allegations of fact which focus on the conduct of the individual who caused the plaintiff's injury. *Reyes v. Sazan*, 168 F.3d 159, 161 (5th Cir. 1999). *See also Wallace v. Dallas Independent School District*, 2000 WL 575219 No. Civ. A. 3:97-CV2820L; N.D. Tex. May 11, 2000.

Whether the relationship between § 1981, § 1983 and Title VII, is that as announced by this Court in *Jett*, *supra*, and applied by the Fifth Circuit or that as "implied" by the Ninth Circuit's reasoning, the bottom line remains the same. In order for the Petitioner to pursue a § 1981 claim independently of § 1983 through § 1981 or a § 1981 claim through § 1983 he must first properly plead and meet the burden of alleging and proving a "custom or policy."[8]

The Petitioner is not prevented from seeking recourse for the violation of any rights and is armed with an arsenal of weapons. However it is incumbent that he properly employ them. Petitioner is now seeking a second opportunity to amend his pleadings by implication through the suggestion of divergent opinions of the various circuits. Yet the substance of the issue remains the same and even accepting Petitioner's reliance on *Federation* would not be dispositive of this case.

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8. In Considering whether the amendment to 42 U.S.C. § 1981 abolishes the "policy or custom" requirement set forth in Monell and reinforced in Jett, we note that the new § 1981(c) contains language very similar to that of 42 U.S.C. § 1983. Subsection 1981(c) provides that § 1981(a) rights are protected against "impairment. . . . *under color* of State law, while 42 U.S.C. § 1983 imposes liability for the deprivation of rights resulting from actions taken '*under color*' of any statute, ordinance, regulation, custom, or usage of any State[.]" The Supreme Court based its "policy or custom" requirement, in part, on this very language. Because Congress made use of very similar language in enacting § 1981(c), we conclude that it thereby intended to import into the new subsection the traditional "policy or custom" requirement set forth in *Monell*, 436 U.S. at 694, 98 S. Ct. at 2037-38, and applied to § 1981 violations in *Jett*, 491 U.S. at 735-36, 109 S. Ct. at 2722-23.

Under Title VII , suits against individuals must proceed in their official capacity; individual capacity suits are inappropriate. The relief granted under Title VII is against the employer, not individual employees.[9]

In this case we are dealing with an independently elected constitutional officer who is the actual employer, and that is the Sheriff. The Sheriff, in denying Oden promotions acted in an official capacity.[10] There are no allegations that the Sheriff or anyone else did anything to violate any other protected rights of the Petitioner.

The bottom line overlooked by the Petitioner is the fact that in order to maintain a Title VII cause of action and a § 1983 or § 1981, the petitioner must assert a right under either and then plead. Independent rights, those not created by Title VII, could be vindicated pursuant to § 1981 or § 1983. The Petitioner sought neither. Petitioner is attempting to vindicate the same claim under the same set of facts against the same affiant seeking compensatory damages under Title VII, and because he is prevented under Title VII, to seek punitive damages under § 1981[11].

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9. *Kentucky v. Graham*, 473 U.S. 159, 167 n.14, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985).

10. *Harvey v. Blake*, 913 F.2d 225 (5th Cir. 1990); *Grant v. Lone*, 231 F.3d 649 (5th Cir. 1994).

11. *Ratliff v. City of Milwaukee*, 795 F.2d 612, 623 (7th Cir. 1986); *Alexander v. Chicago Park District*, 773 F.2d 850, 855-56 (7th Cir. 1985), *cert. denied*, 475 U.S. 1095, 106 S. Ct. 1492, 89 L. Ed. 2d (1986); *Trigg v. Fort Wayne Community Schools*, 766 F.2d 299, 301 (7th Cir. 1985); *Day v. Wayne County Board of Auditors*, 749 F.2d 1199, 1204 (6th Cir. 1984); *Owens v. Rush*, 654 F.2d 1370, 1380 n.12 (10th Cir. 1981).

Petitioner poses another question to the Court relative to the availability of punitive damages under § 1981 by attempting to sue the Sheriff in his individual capacity. The question is academic in that the Petitioner did not establish the basis of a § 1981 case under the *Federation* holding.

Petitioner's argues that the availability of punitive damages under § 1983 against governmental officials sued individually should be equally true under § 1981. Petitioner's recognition of this similarity as the fundamental burden imposed under each to plead a "custom or policy" is welcome. The leap beyond to a conclusion that punitive damages should be permissible under § 1981 under these circumstances overlooks several important facts and begs the point.

The petitioner must do more than simply style his complaint as a suit against the Sheriff in his individual capacity. Petitioner must state a claim based upon rights independent of Title VII. Otherwise he falls within the bounds of Title VII which prohibits punitive damages against political subdivisions. The Court was correct in denying punitive damages in this case. Petitioner's Potemkin approach fails.

CONCLUSION

The Petitioner's case lacking critical elements does not warrant review under any pretext or by injecting a conflict between this Court and the Ninth Circuit. It is not necessary or warranted simply because of the infirmity in the Petitioner's case is terminal before any conflict can be considered. For all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

WILLIAM J. COLE*
P.O. Box 13509
Jackson, MS 39236
(601) 969-7050

JOHN FOX
P.O. Box 167
Houston, MS 38851
(662) 456-4201

JACKSON M. BROWN
P.O. Box 57
Starkville, MS 39760
(662) 323-4126

Attorneys for Respondents

* *Counsel of Record*

(3)

No. 00-1927

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In The

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JESSE ODEN,

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OKTIBBEHA COUNTY, MISSISSIPPI;
DOLPH BRYAN, individually and in his
official capacity as Sheriff of Oktibbeha County,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITIONER'S REPLY MEMORANDUM

*Robert B. McDuff
767 North Congress Street
Jackson, Mississippi 39202
(601) 969-0802

Wilbur O. Colom
P.O. Drawer 866
Columbus, Mississippi 39703-0866
(601) 327-0903

Counsel for Petitioner
**Counsel of Record*

5pp

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY MEMORANDUM

This brief is submitted to reply to two contentions in the opposition brief of the respondent: (1) that *Jett v. Dallas Independent School District*, 491 U.S. 701 (1989) precludes a lawsuit against state actors under 42 U.S.C. § 1981; and (2) that any claim here must allege and prove a custom or policy. These are addressed in turn.

Contrary to the repeated suggestions of the respondents, op. cert. at 3-8, 10, and of several courts of appeals, *see*, pet. app. 4-5 and n.2, *Jett* never explicitly held that § 1981 provides a citizen with no rights against state actors. It simply held that a cause of action invoking such rights does not provide remedies any broader than those provided under 42 U.S.C. §

1983. Indeed, in a number of places, the plurality in *Jett* made it clear that § 1981 can be infringed by state action. *See, e.g.*, 491 U.S. at 731 (referring to "the 'state action' portion of § 1981"); *id.* at 735-736 (stating that, under certain circumstances, a person's "'right to make contracts' protected by § 1981" can be vindicated by lawsuits against local governments).

In the present case, as noted by the Court of Appeals, pet. app. at 2, the plaintiff raised claims under Title VII of the Civil Rights Act of 1964 and also under § 1981. He did not specifically mention § 1983 in his complaint. But if § 1981 protects certain rights against state action, surely it is not necessary to mention § 1983 in the complaint. § 1983 simply provides that "any person who, under color of any law . . . shall subject . . . any person . . . to the deprivation of any rights . . . *secured by the Constitution or laws of the United States*, shall . . . be liable to the party injured in any action at law. . . ." (Emphasis added). In other words, "rights . . . secured by the . . . laws of the United States" can be invoked "in any action at law" against a state actor. § 1981 is one of the "laws" that is the source of those "rights" — in this case, what the plurality in *Jett* called the "'right to make contracts' protected by § 1981." § 1983 is a procedural vehicle simply allowing the "rights . . . secured by" those laws to be enforced in courts. While it likely is necessary in a complaint to invoke the specific law that provides the source of the rights at issue — in this case § 1981 — it is not necessary to specifically mention § 1983, which provides no substantive rights, but simply sets out a procedural vehicle.

As mentioned in our petition for certiorari, all of this is supported by the language of 42 U.S.C. § 1981(c), added in 1991, which confirms that "[t]he rights protected by this section are protected against impairment by nongovernmental discrimination *and impairment under state law*." (Emphasis added). Even if this does not overrule the holding in *Jett* that

remedies under § 1981 are no broader than those under § 1983, it does confirm that lawsuits against state actors can be brought under § 1981. (Indeed, as mentioned previously, *Jett* never explicitly held otherwise). If that is the case, then (as we explain at pp. 5-6 of our petition for certiorari) punitive damages are available against state actors in their individual capacities under § 1981.

Unfortunately, as noted previously, the Court of Appeals in this case, as well as some (but not all) of the other courts of appeals to address the question, have held that no claim can be brought against state actors under § 1981. That decision by the court below is one of the pillars upon which it rested its ultimate ruling that punitive damages are unavailable to a public employee claiming racial discrimination under § 1981 (even in individual capacity lawsuits). Because of the confusion and conflict that exists, this Court should grant certiorari.

Much of the respondent's brief in opposition is devoted to the contention that the plaintiff here has alleged no "custom or policy." Op. cert. at 7, 9-14. But a "custom or policy" is only one method for proving liability against a local government (or against a government officer in his or her official capacity, which is the same as proving liability against the government itself). Another method is to show that the official is a final policymaker for the governmental entity "such that [his or her] decisions may rightly be said to represent the official policy of the [local government]." *Jett*, 491 U.S. at 736. Here, of course, the Sheriff is the final policymaker in terms of hiring and firing deputy sheriffs.

More importantly, the basic question raised by the petition for certiorari in this case is whether the Sheriff here is liable for punitive damages *in his individual capacity*. *See*, pp. 5-6 of the petition. That, of course, requires no proof of a "custom or policy" or of action by a final policymaker. Those concepts

relate only to the liability of an officer in his or her official capacity, or to the liability of the local government that he or she represents.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, a writ of certiorari should issue to review the decision of the Fifth Circuit in this case.

Respectfully Submitted,

*ROBERT B. MCDUFF
767 North Congress Street
Jackson, Mississippi 39202
(601) 969-0802

WILBUR O. COLOM
P.O. Drawer 866
Columbus, MS 39703-0866
(662) 327-0903

Counsel for Petitioner

*Counsel of Record